No. 86-1706

IN THE

Supreme Court of the United States

October Term, 1986

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

-against-

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari of the United States Court of Appeals for the Second Circuit

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REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

Other:

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REASONS FOR GRANTING THE WRIT

By doing little more than parroting the opinions of the federal

courts, respondent has failed to state anything in his Brief in Opposition that undercuts the arguments made in the Petition as to why this matter raises substantial issues of constitutional law for this Court to consider.

The first question raised by petitioner concerned the fact that the circuit court had transformed its habeas corpus jurisdiction into a broad grant of supervisory power. The court did that when it concluded in an opinion now reported at 812 F.2d 821 that in order for the state to maintain the sanctity of its judgment against petitioner it had to afford petitioner, who allegedly had been denied the right to proceed pro se, a retrial with the option of counsel. Respondent's answer is that the burden imposed on the state by the

federal court is not "justiciable." Without citing precedent, respondent asserts that petitioner is seeking an advisory opinion.

Of course, petitioner is not. First, petitioner seeks review of a final judgment of the Second Circuit which vitiates a state judgment. Second, the Second Circuit has conclusively determined that the state court is obligated to afford petitioner counsel on a retrial to preserve its judgment. Thus, the Second Circuit determination, in removing from the state any choice on this issue, is a final determination of a federal claim. Therefore, just as a discovery ruling that requires disclosure of confidential files was a final determination permitting review in Pennsylvania v.

Ritchie, 480 U.S. ___, ___-___, 107 S.Ct. 989, 996-998, 94 L.Ed.2d 40, 50-52 (1987), the propriety of this determination is correctly before this Court.

The remainder of respondent's argument respecting the question of remedy is no more than an effort to suggest that petitioner is wrong. However, that response, which appears to view habeas corpus review as no more than a level of appellate review, fails to controvert the conclusion that this case presents a substantial question appropriate for this Court to resolve.

Respondent's other points proceed on the same incorrect factual predicate on which the federal courts in this matter relied. His argument, as well, follows from a mistaken

understanding of the facts in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which respondent seeks to perpetuate in the Brief in Opposition.

More particularly, in this matter the state has consistently maintained that Johnstone's request to proceed pro se was merely a maneuver to force the appointment of new counsel. At the outset of the trial, Johnstone stated when denied new counsel:

> I am not going to go to trial with him. I am not going to represent myself I will just be there (Pet. App. at 48).

He repeatedly informed the judge that he wanted new counsel (Pet. App. 47, 55, 61, 67, 68) and that he believed that if he proceeded pro se he would gain a reversal of any conviction on the ground

that he was denied new counsel (Pet. App. at 52, 62-64; see also 66-67). In fact, as shown by the following colloquy between Johnstone's attorney and the judge, both saw the pro se request as an effort to gain new counsel:

> MR. VAN LEER: That is not truly his wish. His wish is to have another lawyer.
>
> THE COURT: I am aware of that. I turned that application down (Pet. App. at 73-74).

We have consistently argued throughout this litigation that the state judge rejected the application to proceed pro se at least in part because the request, prompted by a stubborn belief that any conviction would be reversed, was not an unequivocal request by defendant for permission to represent himself. Throughout the federal litigation the courts have scarcely even

given lip service to that argument and to the fact that, if supported by the record, it should have presumptively preclusive effect. Instead, the federal courts have focused, as respondent does now, on the state judge's wholly separate conclusion that Johnstone was not "qualified" to represent himself.

Importantly, however, regardless of which basis resulted in the state judge's rejection of the request to proceed pro se, it is plain from the record that the request stemmed from Johnstone's dissatisfaction with his assigned attorney. This is important because, as respondent does not appear to dispute and as we pointed out in our petition, there is diversity of opinion in the courts of this land over Faretta's requirement that a waiver of

counsel not be accepted unless it is made with the "eyes open." We pointed to the varying results between the Second Circuit and other circuits in situations where a criminal defendant seeks to proceed pro se because he is dissatisfied with an appointed attorney which the court will not replace (Pet. at 27-30).

Indeed, rather than dispute the diversity, respondent alleges in the Brief in Opposition that Faretta somehow resolves any question because Faretta made a request for counsel as an alternative to proceeding pro se. However, what we believe is critical is that, as Faretta's own brief to this Court alleged, Faretta first insisted on proceeding pro se. Only when that request was denied did he seek different

counsel. Brief for Petitioner at 9-10, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This was plainly set forth in our petition (Pet. at 29 n.); respondent, however, in the Brief in Opposition sought to perpetuate the same mistaken view of the Second Circuit that the reverse was true (Brief in Opposition at 27 n.). Thus, in Faretta's case his request to proceed pro se was not made, as was respondent's, because of a failed effort to replace his assigned attorney with another attorney.

Finally, rather than attempt to deal with why we believe that the Court should examine its dicta regarding harmless error in light of its other precedent in a case presenting the issue on an appropriate set of facts,

respondent does no more than cite the dicta as the reason for not granting certiorari.

* * *

As we concluded in our petition, we recognize that the fate of Gregory Johnstone does not justify review. What justifies review is that the decisions of the federal courts in this matter are at odds with what we believe are the appropriate norms of federal-state comity. The federal courts have imposed a remedy on the state that goes beyond what was alleged to have been lost by Johnstone. The federal courts also have paid no deference to the reality of the state court proceeding. Indeed, in a way that appears to conflict with other courts, the federal courts in this case have

interpreted Faretta's requirement of an "eyes open" waiver to mean no more than that warnings were "mouthed" to the criminal defendant. The decision below seems to vitiate any requirement that the judge not allow waiver of counsel unless the judge is satisfied that the criminal defendant is aware of the consequences of his waiver. Even if that is the correct view, in light of the fact that other courts have found the requirement to be the higher standard, this Court should grant the writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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